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No. 87-1930

IN THE

Supreme Court of the United States

October Term, 1987

SELMA SMITH,
Plaintiff-Petitioner,
v.
THE FIRST NATIONAL BANK OF ATLANTA,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the Eleventh Circuit properly affirmed the District Court's exercise of discretion in allowing defendant to file responses to plaintiff's requests for admission, where the requests were served with the complaint, where defendant's new staff attorney inadvertently failed to respond timely to the requests, and where leave to respond was granted only upon condition that plaintiff be allowed two months of additional discovery and be paid $18,275.00 in costs and attorney's fees?

2.

Whether defendant, a national banking association, is a "consumer reporting agency" subject to the Fair Credit Reporting Act where the information it provides relates solely to transactions and experiences with its own customers?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Selma Smith (plaintiff-appellant), and Respondent The First National Bank of Atlanta (defendant-appellee). Plaintiff's ex-husband, Robert Woody, was dismissed with prejudice as a defendant below prior to the District Court's final judgment.

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Respondent The First National Bank of Atlanta (the "bank") respectfully requests this Court to deny the petition for a writ of certiorari that seeks review of the Eleventh Circuit's affirmance of the District Court's grant of summary judgment to the bank.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Eleventh Circuit was entered on February 26, 1988. Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff filed this case against the bank and her ex-husband after he forged her name to a Visa application, allowed the account to become delinquent, and the bank reported the delinquency to a local credit bureau. Six days after the forgery was confirmed by the bank, the information concerning plaintiff was deleted from the credit bureau's files. It is undisputed that plaintiff was never denied credit as a result of the report, obtained credit in the interim, and suffered no actual damages.

Plaintiff seeks review of the Eleventh Circuit's affirmance of the District Court's exercise of discretion in granting leave to the bank to file responses to plaintiff's requests for admission, to which the bank had inadvertently failed to respond timely. Plaintiff also seeks review of the Eleventh Circuit's affirmance of the summary judgment granted to the bank on the ground that the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act.

On October 3, 1984, plaintiff filed suit in the Superior Court of Troup County, Georgia, and served requests for admission with her complaint. On November 8, 1984, the bank removed the case to the United States District Court for the Northern District of Georgia, Atlanta Division, and filed an answer denying the allegations of the complaint.

On April 30, 1985, plaintiff moved for summary judgment based upon "admissions" the bank technically had made by inadvertently failing to respond to plaintiff's requests for admission. Less than two weeks later, the bank moved for leave to file responses to plaintiff's requests for admission. On May 27, 1985, the bank filed its own motion for summary judgment with supporting affidavits and a brief.

In an order dated August 19, 1985, the District Court granted the bank's motion for leave to file responses to plaintiff's requests for admission and granted the bank's motion for summary judgment. Petitioner's Appendix E.

With respect to plaintiff's claim under the Fair Credit Reporting Act, the District Court ruled that the bank was not a "consumer reporting agency" within the meaning of 15 U.S.C. § 1681a. *Id.* at 11-15. The District Court also entered summary judgment against plaintiff on her state law libel claims because of her admitted lack of any damages. *Id.* at 17-22. The District Court denied plaintiff's motion for summary judgment for these same reasons.

Plaintiff appealed the District Court's August 19, 1985 order. On July 24, 1986, the Eleventh Circuit reversed the District Court on the sole ground that the District Court had improperly applied Fed. R. Civ. P. 36(b) in granting the bank's motion for leave to file responses to plaintiff's requests for admission. Petitioner's Appendix B. The Eleventh Circuit remanded with direction to the District Court to apply the two-part test of Rule 36(b) in considering the bank's motion for leave to file responses. *Id.* at 12. The Eleventh Circuit did not, at that time, reach the merits of the bank's summary judgment motion.

On remand, the District Court explicitly applied the two-part test of Rule 36(b) and held that (1) the presentation of the merits of the action would be subserved by permitting the bank to respond to the requests for admission, and (2) plaintiff had failed to demonstrate that withdrawal of the "admissions" would prejudice her in maintaining her action on the merits. Petitioner's Appendix D. The District Court also concluded that it would be "manifestly unfair and grossly unjust to permit the plaintiff to obtain a judgment of the magnitude she is seeking [$1.5 million] due to the inadvertence of the defendant." *Id.* at 3.

The District Court conditioned relief upon the bank "reimbursing the plaintiff for the expenses she has incurred in connection with the appeal . . ., responding to the defendant's motion to withdraw admissions, and responding to the defendant's motion for summary judgment." *Id.* at 3-4. The court also reopened discovery for sixty days. Finally, the District Court held that should the plaintiff discover "that the delay . . . in any way affected her ability to obtain appropriate discovery, the plaintiff [would] have the right to bring such facts to the attention of the court and to seek appropriate additional relief." *Id.* at 5. Plaintiff was paid and accepted $18,275.00 as reimbursement for the expenses and attorney's fees specified.

Plaintiff subsequently deposed three present or former bank employees, served interrogatories, a second set of requests for admission, and a second request for production of documents, to which the bank timely responded.

After the close of the supplemental discovery period, the bank renewed its motion for summary judgment. Plaintiff opposed the bank's motion and moved to "reinstate Rule 36 admissions." On June 17, 1987, the Dis-

trict Court denied plaintiff's motion to reinstate the inadvertent "admissions" and granted the bank's motion for summary judgment (by adopting its prior order on the merits). Petitioner's Appendix C.

Plaintiff appealed this ruling and on February 26, 1988, the Eleventh Circuit affirmed the District Court in all respects. Petitioner's Appendix A.

Plaintiff's efforts in this case have been directed toward taking advantage of an inadvertent failure by a new staff attorney for the bank who unintentionally failed to respond to plaintiff's requests for admission. Instead of conducting discovery on the merits, plaintiff waited more than five months to file a motion for summary judgment that was based solely on the inadvertent "admissions."

Once these "admissions" were withdrawn (which covered every element of plaintiff's stated causes of action), the undisputed facts demonstrated that the bank was entitled to summary judgment. The bank does not assemble or evaluate information on consumers for the purpose of furnishing that information to third parties, except with respect to information as to the bank's transactions or experiences with its own customers. The bank does not give out information contained in credit applications bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Most importantly, plaintiff admits that she was not denied credit as a result of the report made by the bank, was extended credit after the report was made, and suffered no monetary loss or other special damage as a result of the report.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S EXERCISE OF DISCRETION IN ALLOWING THE BANK TO RESPOND TO PLAINTIFF'S REQUESTS FOR ADMISSION.

The Eleventh Circuit affirmed the District Court's exercise of discretion in allowing the bank to withdraw "admissions" inadvertently made by failing to respond timely to plaintiff's requests for admission. Contrary to plaintiff's suggestion, this holding is in complete accord with decisions of this Court and every other circuit court, and does not involve an important question of federal law. The circuit courts have unanimously held that a district court's application of the two-part test of Fed. R. Civ. P. 36(b) is reviewed under an abuse of discretion standard. *See, e.g., Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1247-48 (9th Cir. 1981); *Warren v. International Bhd. of Teamsters*, 544 F.2d 334, 340 (8th Cir. 1976). The Eleventh Circuit properly affirmed the District Court's exercise of discretion in this case.

II. THE BANK IS NOT A "CONSUMER REPORTING AGENCY" SUBJECT TO THE FAIR CREDIT REPORTING ACT.

The text of 15 U.S.C. § 1681a(d) expressly excludes from the purview of the Fair Credit Reporting Act any credit report "containing information solely as to transactions or experiences between the consumer and the person making the report." It is undisputed that the bank only reports its transactions and experiences with its own customers. Thus, the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act. The lower courts' holdings on this issue are in complete agreement with every other decision on point. *See Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985); *Freeman v. Southern Nat'l Bank*, 531 F. Supp. 94 (S.D. Tex. 1982); *D'Angelo v. Wilmington Medical Center, Inc.*, 515 F. Supp. 1250, 1253 (D. Del. 1981); *Peller v. Retail Credit Co.*, 359 F. Supp. 1235, 1237 (N.D. Ga. 1973), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974). Therefore, the Eleventh Circuit and the District Court correctly ruled that the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
June 22, 1988

Respectfully submitted,

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